United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1001

To be argued by
JOHN P. FLANNERY, II

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1001

UNITED STATES OF AMERICA,
Appellee,

—v.—

MATTHEW MADONNA and SALVATORE LARCA,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JOHN P. FLANNERY, II,
PATRICIA ANNE WILLIAMS,
ALLEN R. BENTLEY,
FREDERICK T. DAVIS,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

Matthew Madonna and Salvatore Larca appeal from judgments of conviction entered on December 21, 1976, in the United States District Court for the Southern District of New York, after a two-week trial before the Honorable Robert L. Carter, United States District Judge, and a jury.

Indictment 76 Cr. 846 was filed on August 27, 1976, in two counts. Count One charged five named defendants,* including Madonna and Larca, and five co-con-

* Also named in the indictment as defendants were Joseph Boriello, Joseph Florio and Richard Klinger. Richard Klinger was tried and convicted with Madonna and Larca. Sentenced by Judge Carter to six months imprisonment on December 21, 1976,

[Footnote continued on following page]

spirators with conspiracy to import, distribute and possess with intent to distribute heroin in violation of Title 21, United States Code, Sections 846 and 963. Count Two charged only Madonna and Larca with the substantive offense of possession with intent to distribute heroin in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

Trial commenced before Judge Carter on November 1, 1976. On November 16, 1976, the jury found Madonna and Larca guilty on both counts. Both Madonna and Larca were remanded without bail pending sentence.

On December 21, 1976, Judge Carter sentenced Madonna to a term of imprisonment of 15 years, on each count, to run consecutively, and also fined him $25,000 on each count.* On that same day Judge Carter sentenced Larca on Count One and Count Two to 15 years imprisonment, the terms to run concurrently.

Madonna and Larca are in custody pending this appeal.

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he has not appealed his conviction. Boriello and Florio pleaded guilty prior to trial after they agreed to cooperate with the Government, and testified at trial. Of the five unindicted co-conspirators, Eugene Travers and Jan Portman were indicted in Hawaii, pleaded guilty pursuant to Rule 20 of the Federal Rules of Criminal Procedure in the Southern District of New York, and in accordance with the terms of their respective agreements with the Government, also testified at the trial of Madonna, Larca and Klinger.

* Judge Carter said at the time of sentence.

"I have never inflicted a sentence as severe as the one I am about to impose. And I trust that I never will have to do this again." (Tr. 2174).

Citations to "Tr." refer to pages in the transcript, and to "GX" to Government's exhibits.

Statement of Facts

The Government's Case

A. Synopsis.

The Government's evidence, presented through the testimony of twenty-four witnesses and approximately 60 exhibits, established that from May 1, 1976, through August 31, 1976, Madonna, Larca and their co-conspirators conspired to import about $10,000,000 worth of pure heroin from Bangkok, Thailand, to New York via Honolulu, concealed in false-sided suitcases and carried by couriers they recruited and whose silence upon arrest they incorrectly assumed had been purchased.

Most of the actual smuggling was accomplished by Boriello, together with Jan Portman and Eugene Travers, whom Boriello hired as couriers. All three testified for the Government. Salvatore Larce was the financier and organizer of the operation and, together with Matthew Madonna, was the intended recipient of the heroin.

B. The Bangkok heroin source is discovered.

Sal Larca and Ralph Battista were close friends since Battista was only 12 years of age. (Tr. 1403). Larca lent Battista money (Tr. 1425), and on other occasions paid him for narcotics transactions. (Tr. 177-178). Battista, by his own account, would "do anything" to help Larca. (Tr. 1428).

In January 1976, Ralph Battista introduced Larca to Joseph Boriello, his half-brother. (Tr. 108, 1404, 1428). On 20 or 30 occasions afterwards, Larca took Boriello to

his $100,000 Bronx compound.* (Tr. 300). Sometime prior to April 1976, Larca loaned Boriello, then an unemployed addict, about $9,000. (Tr. 109).

In April 1976, Boriello used the loan from Larca to travel around the world to Bangkok, Thailand, where Li Chai, a Thai law student, gave Boriello a sample of pure heroin. (Tr. 109-111, 243-44). In late April or early May of 1976, in New York (Tr. 116, 112, 242), Boriello trusted Larca to test that sample. (Tr. 116). Larca waited two days for his chemist (whose identity was not disclosed to Boriello) to conclude the sample was "216 on the thermometer test" or "pretty close to pure [heroin]"; Battista, one of Larca's partners, reported the results to Boriello. (Tr. 117-18).

C. Larca requests and receives one kilogram of heroin.

Boriello told Larca that, if he wished, he could have as much heroin as he wanted for about $7,500 "per package" (*i.e.*, per kilogram) (Tr. 116-17), but that he (Boriello) would need $20,000 not only to buy the heroin but also to cover travel expenses for himself and an additional courier he would recruit. (Tr. 119-20). Larca took a few days to obtain approval for the expenditure. (Tr. 120).

In early June, Boriello and Aurora, a female courier whom he recruited from California, flew on separate flights to Bangkok to "connect" with Li Chai. (Tr. 122-

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* Boriello was able to describe the Larca compound on both direct and cross examination in minute detail not only by verbal descriptions, (Tr. 112-115, 211-217, 274, 275, 282), but also by a sketch (Tr. 211-217; GX 17). He also identified photographs of the Larca compound and the surrounding neighborhood. (Tr. 112-115, 282-288; GX 17B; Larca X A-P).

26; GX 1, 2). Boriello met Li alone. When he subsequently returned with Aurora to the United States, the kilogram of heroin was taped by ace bandages to Aurora's thighs until transferred to Boriello in Los Angeles. (Tr. 126-27). On June 18, Boriello arrived alone in New York with the heroin. (Tr. 127-34; GX 3, 4). Exhausted from jet lag, he "left word" with Larca's wife that he had returned, and told his half-brother, Ralph Battista, that he was "going [home] to sleep." (Tr. 133-34, 330-32).

Later that day, Larca went to Boriello's apartment, awakened him, and asked, "Where are the goods?" "Right here with me [in my apartment]," responded Boriello. Larca accused Boriello of being "out of his mind" to keep the "stuff" in his apartment and left. (Tr. 134).

Larca immediately arranged to secure and sell the heroin. Then Larca returned to retrieve the kilogram of heroin and sold it for at least $100,000.*

D. The test package a success, Larca plans a large shipment.

The first kilogram was merely a test. Larca "started talking about [Boriello] making another trip, a bigger

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* Boriello testified that from the sale proceeds Larca gave him a $9,000 profit share (Tr. 135), $6,000 for each of two couriers (Tr. 163, 168) and $88,000 toward the purchase of more heroin in Thailand (Tr. 177-178) totaling about $110,000. That figure, however, does not account for other expenses like Larca's $4,000 payment for the false sided suitcases to transport the heroin, not to mention profit due Larca, Battista and other partners then unknown to Boriello. Eugene Travers and Jan Portman, the couriers eventually recruited, corroborated Boriello both as to the size of their respective payments and the cash available for purchasing the heroin. (Tr. 691-93, 460-62).

trip for more goods," and outlined the following plan. Larca would supply four false-sided suitcases costing him $1,000 each to carry heroin concealed within, and would also provide a budget of about $100,000 which Boriello would dispense, according to Larca's directions, for couriers, travel expenses and the heroin itself. Boriello bore the risks for recruiting and maintaining couriers, and would travel to the Far East to meet his Thai "connection" and to give the heroin to the couriers for the return trip. Boriello would then precede his heroin-laden couriers to New York where Larca would tell him what to do with the heroin. (Tr. 136).

E. Two couriers are recruited.

Boriello spent the Fourth of July at Larca's home with Larca's family, his own two half-brothers and their wives. (Tr. 300). The following day, Joseph Boriello and his common-law wife Leslie Laub* called the Klingers

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* In the District Court and in appellate papers, the suggestion has been made by Larca and Madonna, that Boriello's and Leslie's relationship was a casual, if not tawdry, one (Larca Br. at 6, 8, 16, 17; Madonna Br. at 14, fn. 19). The characterization is grossly misleading. For three years, Leslie and her child of a former marriage lived with and were supported by Boriello, (Tr. 304).

The relationship between Boriello and Leslie Laub was further explored in a pre-trial hearing to determine the circumstances of her disappearance. After his arrest on August 20, 1976, Boriello was detained at the Metropolitan Correction Center (M.C.C.). Almost immediately thereafter, Leslie told Phyllis Hirshorn, a friend, that "...she, Leslie, was very worried. She didn't know what to do because the Mafia had told her to get out of town." (H. Tr. 206). Leslie also told Hirshorn she could not leave because she could not leave her child. Nevertheless, on September 13, 1976, at the M.C.C.C., Ralph Battista told Joseph Boriello, who until then had been in daily contact with Leslie (Tr. 159; Tr. 1434, 1347), that Leslie "...would be staying away until the

[Footnote continued on following page]

in California and told the Klingers they would soon visit them in California.*

Once at the Hyatt Regency Hotel in San Francisco, Boriello called Joseph Florio, an old friend from Synanon. (Tr. 140, 592; GX 18). Over lunch the following day, Boriello explained to Florio that he was looking for a girl with whom he had traveled around the world because he owed her $5000, which he showed Florio. (Tr. 593). Boriello then offered Florio and his wife $50,000 to smuggle heroin into the United States from Thailand because he needed a "square looking couple." Florio was not interested. (Tr. 594). But because Boriello said he "was under a lot of pressures from some big people" to find couriers (Tr. 594), Florio nonetheless helped his friend.

Florio first found a woman named Rhonda (Tr. 141, 594-595), but she withdrew after Boriello had already paid her $500.** (Tr. 141-43, 594-95). Florio then successfully recruited Eugene Travers, an old Bronx

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trial is over." (H. Tr. 169). Boriello has not heard from her since, and her child (whom she had never left before) did not go with her.

Madonna's former counsel even used Leslie's disappearance to get a statement from Boriello. On September 27, 1976, Madonna's then current lawyer Gerald Alch, Esq. and Robert Blossner, Esq., without any attorney representing Boriello being present, asked Boriello to sign a statement for Madonna as they assured Boriello that "We will try to make some effort to find her." (H. Tr. at 167). Without the Warden's consent as required by prison regulations, they obtained Boriello's statement in the prison and then transported it out of the prison.

The apparent kidnapping and obstruction of justice are the subject of a grand jury investigation.

* The Klingers were friends of Leslie Laub. (Tr. 145).

** Rhonda returned the $500 to Florio, who forwarded a check drawn on his own account to Boriello, by then back in New York. (Tr. 597-98, 415-19; GX 19).

friend. (Tr. 595). On the telephone, Florio asked whether Travers wanted to take an all-expense paid trip around the world and receive, in addition to the trip, $10,000 in cash. All Travers had to do was "bring [heroin] back to this country." (Tr. 681). Travers agreed and Florio gave Boriello Travers' phone number.

Boriello then left San Francisco with Leslie to visit the Klingers in Orange County, California. After Richard Klinger proved trustworthy by providing Boriello with some narcotics, Boriello repeated to Klinger what he had told Florio (Tr. 403, 360), and in particular that he needed couriers to travel to Bangkok (Tr. 146) to "move" heroin. (Tr. 385). Klinger offered to "make a few phone calls" because he felt he could ". . . come up with a courier." (Tr. 146).

Klinger first called one girl in Florida and, to test her, "made a deal for her to bring five kilos of cocaine into California"; however she did not appear in California. (Tr. 411). Klinger then tried Jan Portman (Tr. 411), whom he had known all his life (Tr. 446), because ". . . she was good, she had smuggled cocaine in from South America." (Tr. 409). Boriello listened as Klinger called Portman (Tr. 412, 413), who, after some initial prodding by Klinger, agreed to help. (Tr. 449). Klinger merely told her "Joe" would call. (Tr. 450). Boriello, before he left California, promised Klinger ". . . a commission on whatever Jan Portman got,"* (Tr. 149), and later told Portman that she could always get in touch with Boriello by first contacting Klinger. (Tr. 472).

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* Klinger never received the proffered commission since the heroin was seized before it could be sold. One thing, however, is clear: it was unnecessary for Boriello to "importune" Klinger as characterized in Larca's Brief at 7.

Once back in New York, Boriello reported to Larca that he had "two possible candidates," Travers and Portman, whom he planned to interview. Larca said the false sided suitcases would be ready by the time "Boriello was ready". (Tr. 150-51). Boriello interviewed Travers and found him satisfactory. Then Boriello interviewed Portman in Florida and similarly concluded she was acceptable. (Tr. 151-54, 551-54, 682-84).

When Boriello reported he was ready, Larca said, ". . . I want to see what [Travers] looks like, if he [is] presentable enough to go on a trip." *Id.* Boriello was thus told to take Travers to the Cruger Avenue luncheonette where the unsuspecting Travers would be reviewed by Larca and Battista. (Tr. 155). Boriello took Travers to the luncheonette on the pretext that he expected to meet a friend there. (Tr. 155-59, 687-91; GX 26). Unbeknownst to Travers, Larca and Battista were also in the restaurant. Boriello, after ten minutes, lied to Travers that his friend had failed to appear, and they left. (*Id.*). Travers learned a month later in Bangkok why Boriello took him to the luncheonette (Tr. 691), and consequently later described Boriello as a "lackey." (Tr. 716).

When Travers left the luncheonette, Boriello gave him two false-sided suitcases, $6,000 in $100 dollar bills for expenses (Tr. 162-65, 691-93; GX 11-14), and one-half of a $20 bill ". . . in case [Boriello's] plane crashed or something" so that Boriello's people and Travers could each identify the other. (Tr. 694; GX 31). Travers was also told that if he were arrested he should use his one phone call to contact Boriello who, in turn, would speak to "his own people" so that Travers could "be paid $100,000 to leave the country and not come back again." (Tr. 693).

Boriello then summoned Portman from Florida to the New York Sheraton, where he gave her two false-sided suitcases and $6,000. (Tr. 168-169, 460-462; GX 13, 14).

F. The Bangkok rendezvous.

Toward the end of July, Travers, Portman and Boriello (with Leslie Laub and her child) left New York on different flights pursuing three diverse routes, all scheduled to meet in Bangkok the week of August 10, 1976. (Tr. 696, 463, 173; GX 1, 20, 20A, 28).

Travers and Boriello (with Leslie and the child) arrived in Bangkok first. Boriello immediately took steps to obtain ten kilograms of heroin from Li for $65,000 and to pack Travers' two false-sided suitcases.* (Tr. 176-77, 697). It instantly became apparent that the ten kilograms of heroin required more space than previously expected; even with the anticipated arrival of Portman's two suitcases there would be insufficient room to transport much more than seven kilograms. (Tr. 178, 697-98, 700).

The situation was further aggravated by the fact that Portman was late and Boriello's Thai visa was about to expire. Furious, Boriello told Travers "he [Boriello] should have her hit." (Tr. 699). However, his anger

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* The bag (GX 14A) that Boriello used to transport the heroin in Bangkok was easily recognizable to Travers (Tr. 697-698), and Portman. (Tr. 468-471). Special Agents Kieran Kobell and Frank White of the Drug Enforcement Administration seized the bag (Tr. 849-51, 1036-41, 1056-1060) on August 20, 1976, following a search of Boriello's apartment. Chemical tests subsequently conducted by Special Agent John Sawinski demonstrated that the powder residue still visible during the trial testimony of Special Agent Kobell (Tr. 1056-60) was heroin. (Tr. 993-94).

subsided and Portman's suitcases were packed with heroin by Travers. Three kilograms of heroin that Travers could not pack were returned to Li by Boriello.* (Tr. 178, 466-472, 699-701). Before leaving Bangkok, Boriello told Travers that he would contact him at his Bronx apartment. (Tr. 184). Boriello left Bangkok on August 16th after giving Portman one-half of a ten dollar bill so that, as with Travers, Boriello's "people" could identify her if he failed to meet her, as planned, at the Sheraton Hotel. (Tr. 184, 472-73; GX 23). On August 17, 1976, Travers and Portman with their heroin-laden suitcases left Bangkok for the United States. Travers flew directly to Hawaii; Portman flew to Hawaii via Tokyo. (Tr. 476, 701).

G. Travers and Portman are arrested and agree to cooperate.

Travers and Portman were arrested in Honolulu on August 17 and 18, 1976, respectively, carrying a total of twelve pounds of pure Thai heroin. (Tr. 702, 732-34, 476-78, 565-69; GX 54A-54I, 53A, 53B, 30, 21). Immediately upon their arrest, both couriers agreed to cooperate with the Government in a "controlled delivery" of a portion of the heroin seized from their false-sided suitcases. Travers' two suitcases and Portman's two suitcases were emptied of all but a few ounces of heroin; lactose and flour were substituted by DEA Agents for the rest. (Tr. 735-37, 577; GX 54A-54I, 53A, 53B).

On Thursday, August 19, 1976, Travers flew from Honolulu to New York with his two refilled suitcases in

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* Boriello, who obtained Li's Bangkok telephone number (GX 9), told Li that couriers would retrieve these extra three kilograms about a month later. (Tr. 180-81, 700-01).

the company of Special Agents Sidney Hayakawa and Melvin Apo. In New York, two other agents, Special Agents Sam Meale and Kieran Kobell, accompanied Travers to his New York apartment where Travers waited for Boriello's anticipated instructions. Boriello did not call that day.* (Tr. 703, 738, 877-78).

H. Madonna rents the red Ford Granada.

On the same day that Travers returned to New York, Madonna emerged from his concealed position as Larca's senior partner to rent a car to carry the anticipated Thai heroin.

On the afternoon of Travers' arrival, Madonna left his home for LaGuardia Airport with Mario Starace, a friend of Madonna and Larca for about six years, in Starace's car. (Tr. 1498-1500, 1508-1511).

At the airport, at exactly 3:45 P.M., as reflected by a Hertz time stamp, Madonna rented a red Ford Granada.** He did not use his real name, claiming in-

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* Larca contends the testimony of Travers concerning the date of his New York arrival and his first telephone contact with Boriello is confusing. Larca's Brief at 11. To the contrary, Travers stated he arrived in New York on a Thursday (August 19th) and heard from Boriello on a Friday (August 20th). (Tr. 703). These dates were confirmed by the testimony of agents (Tr. 738, 877-78), Boriello (Tr. 186) and exhibits documenting an arrival stamp on Boriello's passport, his ticket and his taped conversations with Travers. (GX 1, 16, 50, 50A).

** Parked in front of Madonna's home as he left for the airport was a 1976 blue and white Chrysler rented from Avis in Madonna's own name. (Tr. 665, 771-78; GX 59). Adjoining Madonna's home were other family homes owned by Madonna in which lived other family members who also had cars. (Tr. 1516-18; GX 32A, 32B, 32C). In addition there were, of course, rental agencies closer to Madonna's home than LaGuardia airport. (Tr. 1514).

stead to be Paul De Robertis.* (Tr. 648-52; GX 35A, 35B).

After Madonna rented the red Ford, he drove it to a fairly crowded hospital parking lot within five blocks of his home, where he parked it. Starace then gave Madonna a lift to a Manhattan restaurant where Madonna spoke to several people. At 7:15 P.M. Madonna was driven home by Starace, who then left. (Tr. 1501-02; 662-65; GX 32A). Moments later, Madonna and his wife left their home to drive off in the Avis car Madonna had rented in his real name (Tr. 665-66, 771-78; GX 59); the "De Robertis car" remained parked at the nearby lot.

I. Madonna and Larca plan to receive the heroin.

On Friday, August 20, 1976, Boriello returned to his New York apartment. (Tr. 184-86, 936-37; GX 1, 16). He then twice called Travers, at 12:05 P.M. and 1:20 P.M,. and told him to stay home for the day; Travers recorded

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* The De Robertis identity Madonna relied on to rent the red Ford declared that De Robertis was a Florida travel agent (GX 37B). Madonna had gone to some lengths to secure this false De Robertis identity. He had opened a bank account in Florida but the balance never exceeded half the money in his pocket at the time of his arrest. (Tr. 1238-47; GX 64A-64E). He rented a Florida apartment but was seen there only by three people who could not remember when they saw him. (Tr. 1565). As for being a travel agent, Madonna carried a business card (GX 37A) bearing De Robertis' alleged business address. However, according to Agent Schlacter's observations and pictures of the building and lobby directory, no such business existed at that address. (Tr. 1201-02); GX 60A-B, 61). There was a telephone number listed in the local telephone directory (GX 62A). However, Agent Schlacter's visit to the address corresponding to that number revealed only an answering service. (Tr. 1204-1206; GX 62). To secure this false identity Madonna even falsified a "De Robertis" passport application, in apparent violation of Title 18, United States Code, Section 1542. (GX 34).

these calls. (Tr. 187-88, 195-96, 211, 703, 878; GX 50A, 50). At about 1:30 P.M., Boriello drove for the last time from his Riverdale apartment across the Bronx at 70 miles an hour to Larca's Pelham home. (Tr. 211, 779, 843-45, 936-37). Unlike any previous occasion, Frank White, a Special Agent, followed in a Government car. (Tr. 779-80). At about 1:45 P.M. Boriello parked around the corner from Larca's home and Agent White parked nearby. (Tr. 217, 780-81; GX 17).

Boriello then walked to the front gate of Larca's home, where he and Larca talked briefly and embraced. (Tr. 217, 781-782). Boriello and Larca left Larca's grounds and retraced Boriello's path to his parked car. But before Larca and Boriello could turn the corner, Larca asked Boriello whether he had been "tailed." Boriello said "he didn't think so", but Larca replied "There's a car around the block, and there's a stranger, looking stupid, making out he's looking at addresses." Boriello turned and saw White. (Tr. 303). For five seconds all three men stared. (Tr. 217-18, 782-83). When Larca and Boriello looked away, White thought he had compromised the surveillance and immediately drove from the area. (Tr. 783-84). Boriello and Larca went to Boriello's car and shortly returned to the grounds where they were joined by Battista. Boriello told them of the Bangkok trip and they entered the grounds. (Tr. 218).

At 2:30 P.M. a more cautious Agent White, having changed his clothes, returned with Agent John Danociek to record car license plates near Larca's home. (Tr. 784, 1000-01). When they were leaving the area they saw Larca leave as well and drive toward Bronx Park East. While they did not follow him, an hour later Larca returned with Madonna and entered Larca's home, where Larca introduced Madonna to Boriello. (Tr. 219).

At about 3:30 or 4:00 P.M., Larca drove Boriello to Bronx Park East, where the rented red Ford was parked. Larca told Boriello to pick up the heroin and that "more than one person" would meet Boriello's heroin-laden Ford at 58th and Fifth Avenue at about 5 P.M.* (Tr. 219-220). However, Boriello was not told who would be with Larca at 5 P.M.

Boriello then drove in the red Ford to Travers' apartment. (Tr. 221). After Boriello arrived,** he told Travers that he would bring the red Ford around to the front of Travers' apartment building while Travers brought the suitcases downstairs. (Tr. 221, 704; GX 51A, 51). Boriello also told Travers he would probably get paid the following day, noting that he had to "deliver this somewhere now . . . and *they, they they're* gonna take time with it. But I'm almost positive that by tomorrow [you will be paid]." (Emphasis added). (GX 51A, 51). Boriello then left the apartment, pulled the car around to the front of the building, honked the horn and placed the suitcases in the car trunk. Boriello was then arrested by Agents Kobell and Meale. He immediately agreed to cooperate to apprehend the intended recipient of the heroin. (Tr. 221-22, 225-26, 726-27).

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* Madonna now states the Government tried to "squeeze out" of Boriello's testimony Larca's anticipation that Madonna would be present at the 58th and 5th Avenue meeting. Madonna's Brief at 4. Madonna contends Larca "indicating more than one person" would be present (Tr. 220) was equivocal at best. However, in the recorded conversation between Boriello and Travers shortly after Boriello's conversation with Larca, Boriello unmistakeably told Travers that "they, they, they're gonna take time with it." (GX 51, 51A).

** During the ensuing conversation, Travers wore a concealed recording device and Agents Meale and Kobell hid in a closet. (Tr. 703).

Shortly thereafter, the agents drove him to a point at 85th Street. There Boriello was permitted to drive the red Ford Granada alone to the 58th Street rendezvous. At 5:00 P.M., an agent, Philip Hayward, had already taken a position at 58th Street and Fifth Avenue. At 5:05 P.M., Hayward saw Madonna driving Larca's Cadillac with Larca as his passenger.* Madonna parked the car one car-length behind the agent and directly in front of Nathan's restaurant. (Tr. 937-38; GX 27). Madonna and Larca left the car and stood in front of Nathan's, looking up and down the street. They then walked west on 58th to Fifth Avenue still looking for Boriello and turned the corner to go south on Fifth Avenue. The agent began to follow them as they left his view but almost immediately they returned to 58th Street and were again within his view. (Tr. 938-39). They walked back towards their car, continually looking for Boriello, and went into Nathan's for a hot dog and drink while they waited. (Tr. 939).

Almost immediately following their entry into Nathan's, Boriello drove up in the red Ford Granada. Boriello took Agent Hayward's parking spot one car-length ahead of Larca's car, then got out of the red Ford. Madonna and Larca walked out of Nathan's to greet Boriello. Boriello gave Madonna the keys to the red Ford (Tr. 861, 886, 950) and Madonna gave Boriello, who said he was thirsty, his soda to drink. (Tr. 340). Larca looked up and down 58th Street as they spoke. (Tr. 961). Larca gave Boriello the keys to his Cadillac and told Boriello to "go back to your apartment and wait for a phone call." (Tr. 228). Madonna got in the driver's seat of the red Ford Granada and was looking at the rental agreement for the red Ford when he was arrested

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* The car was easily recognized as one of the plates previously recorded at 2:30 at Larca's house by Agents White and Danociek, which plates had since been traced. (Tr. 784, 1000-01).

by an agent. (Tr. 886-87). Larca had just entered the passenger's side when he was arrested by another agent. (Tr. 961-62). Boriello had not even entered Larca's Cadillac.

Larca, after he was advised of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), said he was going to ask the agent a question but subsequently would deny that he had ever asked the question. The agent said "ask me." Larca asked "How did you agents follow us down here?", then volunteering, "No one could have followed us." (Tr. 962-63).

Madonna, after he was advised of his rights by Agent Kobell, said that his name was Paul De Robertis. (Tr. 1026). Madonna was also searched incident to this arrest resulting in the discovery of the phony De Robertis papers, and $2,300 in one hundred dollar bills. (Tr. 1027).

Madonna was then taken to DEA Headquarters where in response to each of 40 different pedigree questions asked of him by Special Agent Daniocek he said merely that his name was "Paul De Robertis". (Tr. 1002-03). When Agent Kobell subsequently told Madonna he was going to fingerprint him, Madonna, despite his contrary earlier remarks, signed the fingerprint card "Matthew Madonna." (Tr. 1028-29).*

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*Subsequently, Madonna realized how foolish and harmful pretending to be De Robertis had been to his intended trial defense that this phony identification merely involved an extramarital affair. On October 18, 1976, Madonna, accompanied by his attorney, went to the office of Assistant United States Attorney Flannery in order to provide the Government with handwriting exemplars. Before Madonna provided the exemplars, he was given a sheet of paper reflecting the fact that upon his arrest he had told several agents he was Paul De Robertis. Having obtained the consent of his attorney to speak, he heatedly disclaimed to Agent Kobell in the presence of counsel and the Assistant that he had ever identified himself as De Robertis, despite the contrary statements of several agents. (Tr. 1030-31, 1070-71).

J. Portman calls Klinger.

Jan Portman (accompanied by agents) had followed Travers to New York in the hope that Boriello or one of his associates would contact her. (Tr. 478-79). Disappointed in this hope, she contacted Klinger at about 10:00 P.M. on August 20, 1976, as Boriello had instructed her to do.

Richard Klinger and his wife were both on the telephone for a part of this taped conversation, although for the most part Klinger and Portman spoke alone. Klinger asked whether she had yet gotten rid of the "stuff." She replied that she had not since she could not get in touch with Boriello. She further complained that Boriello informed her in Bangkok that he was reneging on the promised $10,000 payment and that she would only get $7,500. Klinger promised to look into it. In response to Portman's question asking whom Boriello worked for, Klinger replied, "I don't know. Call him the godfather". When she subsequently expressed further concern about Boriello's timely New York arrival, Klinger said Boriello had better be careful or he was ". . . liable to get shot." (Tr. 480-82; GX 52, 52A).

K. The Visceglie testimony.

The Government also offered proof of prior narcotics negotiations involving Larca and Madonna.

Nick Visceglie and Madonna had two conversations at the Golden Hour Bar on a single day in February of 1972.* In the first conversation at 11:30 P.M., Ma-

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* Madonna in his Brief at 43 characterizes Vesceglie's recollection as "too good to be true." Vesceglie *did not* recall the exact dates in February nor did he cite any but approximate

[Footnote continued on following page]

donna promised to supply Visceglie with ten kilograms of heroin. (Tr. 1078-79). Visceglie, having conferred with others, assured Madonna at about 12:30 P.M. in the presence of Salvatore Larca that $200,000 would be ready the following afternoon. (Tr. 1079-81). Madonna told Visceglie that the following afternoon at 2:00 P.M. he should bring the $200,000 cash payment to Larca, who would provide the heroin outside the Burnside Fraternal Organization. (Tr. 1081-82). There were several delays that following afternoon preventing Visceglie from presenting the money on time; in particular, Visceglie's ultimate buyer kept delaying. At several meetings at diverse locations, Visceglie advised Larca of each delay and they accordingly adjourned the transaction. (Tr. 1083-91). However, after these repeated adjournments, Larca informed Visceglie that Madonna wanted to see him. When it was finally clear that the deal would not go through, Madonna came forward and lambasted Visceglie in Larca's presence saying "I don't want you to bother with me no more." (Tr. 1092).

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times for the different meetings. Furthermore, there was ample reason for these events to make an impression on Visceglie since on the second day, when the transaction did not go through, Visceglie fled to Florida for an extended period because he "anticipated a problem" with the buyer. (Tr. 1186).

Madonna further attacks Visceglie's credibility by misrepresenting that Visceglie recalled the 1972 transaction but not a 1973 crime to which he pleaded guilty. Visceglie testified that he did not remember the circumstances of the plea, but he recalled the underlying crime. (Tr. 1134-1135, 1172). The plea minutes as discussed at trial, reveal Visceglie stated he had sold 8 ounces of heroin in the Bronx for about $13,000 (Tr. 1172-1173).

With respect to the apparent contention that Visceglie concocted his testimony for trial, it should be noted (as appellants do not) that Visceglie had not only related the substance of his testimony to Special Agent John O'Neil from April through May of 1976 but he also testified before a Grand Jury in June 1976, more than two months *before* Madonna, Larca and Boriello were arrested. (Tr. 1196-97).

The Defense Case

Through numerous witnesses called by each defendant and through the testimony of defendant Klinger on his own behalf, the defense attempted to offer innocent explanations for their observable activities and to attack the motives and credibility of the witness Boriello. Since the jury apparently did not believe these witnesses, their testimony is described here in somewhat more cursory fashion than it was presented to the jurors.

A. The DeRobertis affair with Joy.

Madonna sought to explain his actions prior to his arrest by demonstrating that he had an affair with an unnamed woman. In December of 1975, one month after Madonna rented the Florida "DeRobertis" apartment, Madonna hired Michael Agli, an investigator and former undercover narcotics detective, to follow an attractive, married but nameless stewardess from LaGuardia Airport to the Sheraton Hotel in Manhattan to determine whether she saw any other man that evening. (Tr. 1531-33, 1542, 1543, 1548, 1549, 1553-57, 1585). Although Agli followed her for four hours, he did not determine her name. (Tr. 1544). The investigator kept no notes of his surveillance and he gave Mr. Madonna only a verbal report. (Tr. 1544).

Mario Starace, a friend of Madonna and Larca since 1971, testified he met Madonna with a woman introduced by only her first name, Joy, in January 1976. (Tr. 1497, 1507).

Another witness testified that an attractive but nameless young woman was seen on a few occasions in the vicinity of the Florida "DeRobertis" apartment. (Tr. 1486, 1491-92).

B. Madonna rents the red Ford.

At about 2:15 P.M. on August 19th, Starace visited Madonna's home for a cup of coffee. Madonna asked Starace to drive him to the airport, "because his girl was coming from out of town someplace"; Starace thought that it was Madonna's girlfriend "Joy." (Tr. 1498-99). When at about 3:15 Starace drove Madonna to the airport, Madonna did not meet "Joy." (Tr. 1513). Madonna, nevertheless, rented a red Ford from Hertz at about 3:45 P.M. Madonna (in the red Ford) was followed by Starace to the Jacobi Hospital parking lot within five blocks of Madonna's home. (Tr. 1500-01, 1518). Starace then drove Madonna to the Tres Amici Restaurant and subsequently returned Madonna to his home. (Tr. 1502).

C. Boriello meets Larca through his half-brother.

Ralph Battista had known Larca for fourteen years, had borrowed money from him and would "do anything" to help him. (Tr. 1393, 1428). He testified that in approximately January 1976 he introduced his half-brother, Joseph Boriello, to Larca at the Capri Bar. (Tr. 1365-66). His brother saw Larca only twice afterwards, on July 4 and August 20, 1976, when there were large numbers of people at Larca's home. (Tr. 1365-1366, 1367-1368).

Battista summarily denied that he or Sal Larca had any knowledge or involvement in this narcotics conspiracy. (Tr. 1359-61). He usually saw Joseph Boriello about three or four times a month since January. However, in April of 1976, when Boriello claimed to travel to Bangkok, Battista said Boriello remained in New York; in April, Battista saw Boriello almost daily, "maybe 20 or 30 times." (Tr. 1357-58).

D. Larca lends Madonna's car to Boriello.

On August 20th, a Friday, Ralph Battista and Benjamin Larca were with Larca and 12 or 15 women and children at Larca's Pelham home relaxing and enjoying the swimming pool. (Tr. 1367-68). Battista testified that at about 1:45 Boriello arrived. (Tr. 1362). Battista walked out of the Larca gate and toward the corner to meet Boriello. They met and Battista accompanied him back to the Larca grounds.* (Tr. 1364). Battista saw no strangers in the area. (Tr. 1442).

Battista brought Boriello to Larca and asked Larca, ". . . do you remember my brother?" (Tr. 1364). Boriello was "introduced" to Sal's brother, Ben. (Tr. 1366).

Benjamin Larca testified about a conversation he had with Boriello in August 1976. During the conversation Boriello told Benjamin Larca he needed to borrow a car (Tr. 1255), stating that he needed to go to the airport to meet a girl. (Tr. 1368-69). Battista immediately asked Sal Larca if his brother could borrow a car, to which Larca assented.

Shortly afterwards, at about 2:20 P.M., Battista and Benjamin Larca heard Boriello ask Larca for the car keys and saw Larca give Boriello the keys and accompany him to the gate to point out the car. (Tr. 1255-56, 1369-70). Larca, however, did not leave the grounds until 4:00 P.M., according to both Ben Larca and Ralph

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* This directly contradicted the testimony of Boriello and Agent White, who testified that Boriello parked the car and went alone to the Larca grounds followed by Agent White. (Tr. 217, 780-82; GX 17).

Battista.* (Tr. 1305-1306, 1420). Vera Battista, Boriello's mother, said Boriello confessed to her that Larca only lent him a car. (Tr. 1481).

At 3:00 P.M., about forty-five minutes after Boriello borrowed the car, Madonna came to the Larca gate. Larca and Battista, sitting about 60 feet away from the gate, saw Madonna and heard him yelling and raising his arms repeatedly. (Tr. 1256-57, 1285). Madonna never entered the Larca grounds but left immediately after this outburst.** (Tr. 1285, 1376).

According to Ben Larca and Battista, at about 3:30 or 3:45 Sal Larca received a telephone call from Boriello. (Tr. 1376-1377). Sal Larca changed clothes and by 4 P.M. or shortly thereafter he had left the house. (Tr. 1378-1379).

E. Boriello's testimony is impeached.

After Boriello's arrest, while he was confined at the M.C.C., Ralph Battista, Ken Battista and Vera Battista (Boriello's mother) visited him several times.

Boriello's mother testified that Boriello confided in her that "20 agents" surrounded and arrested him, Larca and Madonna. She testified, "He [Boriello] yelled out [at the time of arrest], 'I'm guilty, leave them alone, they had nothing to do with it.'" (Tr. 1463). Boriello's mother explained Boriello confessed to her he had im-

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* This directly contradicted the testimony of Agents White and Daniocek, who saw Larca drive toward Bronx Park East at about 2:30 P.M. (Tr. 784, 1000-1001).

** This directly contradicted Boriello's testimony that he met Madonna and Larca at 3:00 P.M. in the "family room" *inside* the Larca gate. (Tr. 219).

plicated Larca because if he did not implicate Larca the federal agents were going to arrest Leslie. (Tr. 1463-64).

Ralph Battista testified that on September 28, 1976, he told his brother at the M.C.C., ". . . you were going to vindicate these two guys, and you aren't doing it." Boriello responded "Mind your own business, or I'll involve you." (Tr. 1388).

On September 30, 1976, Ralph Battista, Ken Battista and Vera Battista were again present at the M.C.C. with Boriello. Ralph said again, "You can't let them go to jail." (Tr. 1389). Boriello told his mother "that he didn't care who he involved as long as he and Leslie were out of it." (Tr. 1464, 1343). At the conclusion of this meeting Boriello said "If you don't all leave me alone, I'm going to involve you and you . . ." (pointing at all three of them). (Tr. 1343-44, 1390, 1464).

The three witnesses also offered other lengthy observations about Boriello's credibility, motives, and reliability. (Tr. 1348, 1440, 1467-69, 1471, 1476).

F. Madonna retrieves clothing.

On August 26, 1976, six days after Madonna's arrest, Madonna provided Agli and his partner with a key for the Florida "DeRobertis" apartment and asked them to retrieve whatever they found, in particular, "femal clothing," in the Florida apartment. (Tr. 1534-35, 1536, 1549). When they went to Florida, they did not know whether Madonna had already been there himself following his August 20th arrest and placed the items there himself. (Tr. 1550). At the apartment they found clothing both for a man and a woman. (Tr. 1536, 1555-58).

Agli went to Florida again in October 1976 to show pictures to determine who knew Madonna. (Tr. 1559).

John Hufnagel, Edith Hufnagel and James Bozzi, three out of 15 people from the apartment complex, nearby banks and restaurants who were shown four photographs of Madonna, identified the person in the picture as "De-Robertis"; they could not recall when they had last seen him. (Tr. 1539, 1550-1553, 1575).

G. Klinger denies knowledge of heroin.

Klinger testified in his own defense that Boriello had visited him at his home in California in July 1976 and said he needed a girl to travel with him for $10,000 on some undescribed secret mission. (Tr. 1663-64). Klinger told Boriello that he knew Jan Portman and could call her for Boriello. (Tr. 1666). There was no mention of drugs in his conversation with Boriello or later with Portman even when she did agree to go. (Tr. 1672-73, 1678). In describing the taped telephone conversation, Klinger explained on his direct examination that the "Godfather" reference was "just a standard joke of mine". (Tr. 1684). He explained that when he said on the tape recording Boriello was ". . . liable to get shot," he meant "if he [Boriello] was sick he's going to get shot". (Tr. 1687).

ARGUMENT

POINT I

Madonna Cannot Complain of the District Court's Denial of his Motion to Preclude his Prior Conviction as Impeachment.

On October 29, 1976, prior to trial, Madonna's attorney filed a motion asking the District Court to preclude the Government from using Madonna's 1954 murder conviction to impeach him in the event that he took the stand. Judge Carter subsequently denied this application. Madonna now asks this Court to conclude that Madonna actually had decided to testify in his own behalf and was precluded from doing so by the District Court's ruling, and that the ruling was incorrect. Both aspects of this contention are utterly refuted by both the facts and the law.

Madonna's application for a ruling on the issue of impeachment was filed on October 29, 1976. It was accompanied by no affidavit of Madonna or of anyone else. Indeed, nowhere in even the attorney's motion or supporting memorandum of law was it either recited or alleged that Madonna would, in fact, testify. Thereafter, only one brief mention was made of the matter. At a pretrial conference held on November 1, 1976, when reviewing the motions still outstanding, Madonna's counsel noted "there is a matter to deny the Government's efforts to impeach." (Tr. 15). Again, there was absolutely no representation that Madonna actually contemplated testifying or any outline of what his proposed testimony would be.

This was the total of the proposal before Judge Carter. The issue was never again mentioned by Madonna or his attorney during trial. On this record alone,

it is clear that Judge Carter's memorandum endorsement of denial of the motion cannot be interpreted as anything other than a declination to make a determination without a concrete factual situation before him;* it simply could not have affected in any way Madonna's decision whether or not to take the stand.**

The artificial nature of Madonna's motion in the District Court, and his claim in this Court on appeal, becomes even clearer when his actual attitude toward testifying during the course of the trial is examined. On several occasions, Madonna and his attorney indirectly but with crystal clarity indicated that under no circumstances would he testify.*** For example, during a bail

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* On November 1, 1976, when the matter received its brief discussion, Judge Carter noted "I don't have to decide that now. (Tr. 15).

** Indeed, while Madonna notes in his Brief at 36 that the motion was dated November 9, 1976, "the day before the government's case was completed," he neglects to inform the Court that the decision was not *filed* until November 15, 1976, several days later and *after all parties had summed up.* The filing of the decision at that late date, without any further request for a ruling by Madonna, itself demonstrates his lack of concern for the issue.

*** As this Court has had occasion to note, defendants in large narcotics cases such as this have testified in their own behalf with great rarity. *United States* v. *Morrell,* 524 F.2d 550, 558 (2d Cir. 1975) (Friendly, *J.*, concurring and dissenting). Cf. *United States* v. *Comulada,* 340 F.2d 449, 453 (2d Cir. 1965). In this case, the disincentives to Madonna's testifying, even if one were limited to facts appearing on the record, were overwhelming. For example, during the very years between his first demonstrable association with Larca (as shown by the Visceglie testimony) and the events underlying the indictment, Madonna filed an income tax return showing approximately $500,000.00 in "Miscellaneous Income", even though he had recently been released from

[Footnote continued on following page]

hearing Madonna's counsel conceded that a false "DeRobertis" passport had been destroyed. He then offered Madonna's testimony for the reasons why the passport had been destroyed but only if this would not be construed as a waiver of his Fifth Amendment rights. (Tr. 8/31/76 at 30-31). On November 9, 1976, when the close of the Government's case was nearing and long after the filing of his motion on the impeachment issue, Madonna's counsel argued against the admissibility of Special Agent Kobell's testimony that Madonna denied using the name DeRobertis by claiming "It is almost forcing my client to take the stand." (Tr. 979). Indeed, *after* the Government had rested, Madonna stated that he wished to demonstrate that the clothes found in the Florida "DeRobertis" apartment fit him, but explicitly noted that he would not model the clothes if doing so "would . . . constitute testimony and . . . effectuate a waiver of [his] Fifth Amendment [rights]." (Tr. 1561).

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spending fourteen years in prison and was associated with no legitimate business. (Tr. 8/31/76 at 13-15). To a defendant whose defense was that he was a mere innocent bystander, this demonstrable fact would have been both admissible and devastating had he taken the stand. Significantly, when the matter was discussed during a pre-trial proceeding, Madonna's counsel acknowledged that Madonna was "the subject of an IRS investigation," but that he would discuss the matter only "in camera." (*Id.* at 30-31). In addition, the Government was in a position to show that the "Miscellaneous Income" return was filed as an amended return only after the investigation into Madonna's taxes had commenced and in fact that Madonna had had expenditures of several hundred thousand dollars a year that were not reported on earlier returns for years shortly after his release from prison.

In short, while these concerns do not necessarily demonstrate in themselves that Madonna's motion was artificial, it lends color to the explicit references, discussed *infra*, that make the hollow nature of his motion apparent.

Thus the record is explicit not only that Madonna never informed the District Court that he wished to testify, but in fact never intended to.*

The law in this Circuit is clear that under these circumstances Madonna cannot now complain of the District Court's ruling. This Court has emphasized that in reviewing the District Court's exercise of discretion in whether to allow a conviction to be used as impeachment, it must be shown that the trial judge had before him a meaningful basis upon which to make a determination, including the proposed testimony of the defendant; the trial judge cannot be "asked to pass on the abstract question of whether, if the defendant testified, evidence of previous convictions would be admitted." *United States* v. *Cacchillo*, 416 F.2d 231, 234 (2d Cir. 1969). Without such a showing, there has been "no meaningful invocation of judicial discretion," and thus there is no issue for review. *United States* v. *Costa*, 425 F.2d 950, 953-54 (2d Cir. 1969), *cert. denied*, 398 U.S. 938 (1970).

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* It is also significant that even in his brief on appeal, Madonna never states that it was his intention to testify under any circumstances. While he coyly notes that the rejection of the Ben Larca testimony of Madonna's statement at the gate left him with his own testimony as the "only way of adducing evidence of the innocence of [his] acts," Brief at 36, this ignores the obvious fact that the ruling on the Ben Larca testimony came *days after* Madonna's motion to preclude the impeachment, and Madonna *never* mentioned the impeachment issue after the ruling on the Ben Larca testimony. Thus, the ruling on the hearsay question simply could not have affected the good faith of Madonna's previous motion, and this is clearly an afterthought added by appellate counsel.

It is also significant that while Madonna made numerous and voluminous post-trial motions, he never presented this issue to the trial judge, who might have made explicit findings about the good faith of Madonna's pre-trial motion or stated more directly how he interpreted that motion.

See also *United States* v. *Gornick*, 448 F.2d 566, 571 (7th Cir.), *cert. denied*, 404 U.S. 861 (1971); *Hood* v. *United States*, 365 F.2d 949, 951 (D.C. Cir. 1966). This is totally consistent with this Court's refusal to encourage artificial issues for review by allowing advisory opinions on evidentiary matters during trial. *United States* v. *Kahn*, 472 F.2d 272, 282 (2d Cir. 1973), *cert. denied*, 411 U.S. 982 (1973) (defendant not entitled to prospective ruling on scope of cross-examination). See generally, *United States* v. *Evanchik*, 413 F.2d 950 (2d Cir. 1969); *United States* v. *Hart*, 407 F.2d 1087, 1088-89 (2d Cir.), *cert. denied*, 395 U.S. 916 (1969). Indeed, when one turns to the merits of the determination that Madonna now claims Judge Carter should have made, it is clear that the judge could have made such a determination only upon the fullest of factual showings. Having failed to provide such a showing, or concretely to request a determination, Madonna cannot now complain of the result.

Finally, even if one were to hurdle these substantial obstacles and assume that the District Court's ruling was addressed to the merits and that Madonna would have taken the stand in the absence of the ruling, Judge Carter's ruling was correct. Madonna's 1954 murder conviction was not simply an "act of violence [resulting] from a short temper, a combative nature, extreme provocation, or other causes," *Gordon* v. *United States*, 383 F.2d 936, 940 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968), as Madonna submits. As the record shows,* the murder conviction was based upon an extra-

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* Unlike the counterposing factual arguments that might tend to show why the conviction would be prejudicial in the context of Madonna's proposed testimony, the facts underlying Madonna's conviction were well known to the District Court. They were the subject of lengthy discussion during the pre-trial bail proceedings, (Tr. 8/24/76 at 10; Tr. 8/31/76 at 12; Tr. 9/2/76 at 342; Tr. 9/3/76 at 123, 341, 373), which the District Court explicitly stated that he reviewed. (Tr. 9/7/76 at 50).

ordinarily cold-blooded killing in which Madonna first approached the victim, who owed Madonna's older brother $900 on a heroin transaction, and broke one of his legs with a baseball bat. Later in the same day, when the drug debt was still outstanding, Madonna returned and shot the man. (Tr. 2087, 2165-66). Furthermore, while Madonna's conviction was subsequently reduced to manslaughter, the facts of this reduction (also brought to the attention of the District Court) were similarly revealing. After serving fourteen years of a "twenty years to natural life" sentence, Madonna was released on lifetime parole in 1968. He then violated the terms of his parole by associating with known narcotics violators and by failing to get a job, and in June 1969 an arrest warrant was issued for him. Madonna remained fugitive for several weeks during which time he could not be reached through his family. On July 30, 1969, a petition for *coram nobis* was filed for Madonna and granted, under suspicious circumstances. The very same day, Madonna pleaded to a manslaughter count.

With this in mind, and particularly in the absence of *any* counterposing demonstration by Madonna of what his testimony might entail, the admissibility of the prior conviction is clear. This is apparent in part from the legislative history of Rule 609(a).* After the original rule as proposed by the Supreme Court had been discussed by Congress, the House of Representatives and the Senate Judiciary Committee initially favored a rule providing—in stark contrast to the law generally existing

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* This history is recounted at length in 3 Weinstein, *Evidence* 609-2 to -55 (1975); see also *United States* v. *Jackson*, 405 F. Supp. 938, 940-42 (E.D.N.Y. 1975) (Weinstein, *J.*); *United States* v. *Smith*, Dkt. No. 75-1920 (D.C. Cir. Dec. 17, 1976) (McGowan, *J.*).

prior thereto—that only convictions concerning truthfulness or veracity could be used to impeach.* This proposal was narrowly defeated in the Senate on a vote called by Senator McClellan.** See *United States* v. *Smith, supra,* slip op. at 26-27. The Conference Committee resolved this impasse by the compromise presently embodied in Rule 609. Under it, convictions dealing with dishonesty or false statement are *automatically* admissible, *United States* v. *Smith, supra,* slip op. at 19; *United States* v. *Dixon,* — F.2d —, 20 Crim. L. Rep. 2347 (9th Cir., Dec. 22, 1976); other convictions are admissible if the conditions set out in Rule 609(a)(1) are met.

From this, several conclusions are apparent. First, the mere fact that Madonna's conviction did not deal with perjury or false statement means only that one must look to Rule 609(a)(1) rather than to 609(a)(2) to determine admissibility; it does not imply that the conviction was in fact inadmissible. Second, following the balancing criteria suggested in 3 Weinstein, *Evidence, supra,* at 609-68 to -74, and in this Court's decision in

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* It was during the House committee proceedings leading to the adoption of this version that the interchange quoted in Madonna's Brief at 38 n. 21 occurred.

** The language employed by Senator McClellan in support of his view is of considerable relevance here:

> ". . . a person who has committed a serious crime—a felony—will just as readily lie under oath as someone who has committed a misdemeanor involving lying. Would a convicted rapist, cold blooded murderer or armed robber really hesitate to lie under oath any more than a person who has previously lied? Would a convicted murderer or robber be more truthful than such a person?
>
> Of course not!
>
> The fact that a person has committed such a serious offense in the past clearly bears on whether he would lie under oath where his life or liberty was in jeopardy."

120 Cong. Rec. S. 19909 (Daily Ed. Nov. 22, 1974).

United States v. *Palumbo*, 410 F.2d 270, 273 (2d Cir. 1968), *cert. denied*, 394 U.S. 947 (1969), admissibility of the conviction would have been proper.* As set out above, the nature of the conviction clearly implied its usefulness in determining Madonna's credibility. Further, while the 1954 conviction was 22 years old, Madonna's release from prison and the 1969 repleading were, as Madonna concedes, within the ten year limit prescribed by Rule 609(b).** Further, the possibility

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* In *United States* v. *Smith*, *supra*, upon which Madonna relies in part, the conviction was reversed and remanded for further proceedings because it appeared that at trial, which occurred within days of the effective date of the Federal Rules of Evidence, the trial judge applied prior law in that Circuit rather than the standards under the Rules. Since the legal (although not the factual) underpinnings of Madonna's motion were discussed in his supporting memorandum of law, Judge Carter was clearly not similarly ill-informed. Compare *United States* v. *Mahone*, 537 F.2d 922, 928-29 (7th Cir. 1976).

Smith is instructive in one further regard. Even if this Court should conclude *both* that Madonna was actually precluded from testifying by an adverse ruling *and* that Judge Carter's ruling may have been made upon an improper standard, it should at most follow the lead of the Court of Appeals for the District of Columbia Circuit and remand for an explicit finding under the Rule. See *United States* v. *Smith*, *supra*, slip op. at 17-18. We strongly reiterate, however, that such a procedure would be proper *only* if the Court first concluded that Madonna actually intended to testify and informed the District Court of that fact.

** This is thus unlike the situation in *United States* v. *Puco*, 453 F.2d 539 (2d Cir. 1971), upon which Madonna primarily relies on this point, where the defendant had been convicted twenty-one years prior to trial for the *same* offense and had received a *one year* sentence.

The rationale for measuring the age of a conviction by release rather than conviction was explained by Judge Weinstein in the following terms, peculiarly applicable to Madonna:

> "The reason for measuring the period of time from the witnesses' release is obvious: Until he has been at large for a number of years it is impossible to tell whether an ex-convict has reformed or merely lacked opportunity to commit another crime."

3 Weinstein, *Evidence* [03] (2) 609-70.

of prejudice to the defendant has generally been measured in terms of the similiarity of the prior crime with the crime charged, *United States* v. *Puco*, *supra*, 453 F.2d at 542; *Gordon* v. *United States*, *supra*, 383 F.2d at 940; this was inapplicable here. Finally, the determination of whether credibility was "central" to the issue, *Weinstein*, *supra*, at 609-74-75, cannot be properly made in the total absence of any showing that Madonna would have testified. However, on the common sense assumption that he would have denied the obvious inferences to be drawn from the circumstantial proof and the direct proof offered by Visceglie, it is fair to assume that his credibility would have been central indeed.

In short, even if one were sufficiently charitable to conclude that the District Court actually ruled on a concrete motion by Madonna and thereby precluded him from testifying—although, we earnestly repeat, such was simply not the case—that action was proper.

POINT II

The District Court's Exclusion of Madonna's Out-of-Court Declaration was not Improper.

Through the testimony of two witnesses, Ben Larca and Ralph Battista, the defense sought to prove a certain out-of-court declaration made by Madonna to Larca on the afternoon of August 20, 1976. (Tr. 1257, 1371). Madonna now assigns as error the action of the District Court in sustaining the Government's objection to the remark as hearsay. This claim must be rejected for three reasons. First, Madonna never properly raised the issue in the District Court, and at the very least offered the trial judge precious little aid in making the determination Madonna now claims was erroneous. Second, the

trial judge's conclusion that the statement was hearsay was correct. Finally, exclusion of the statement, when viewed in the context of the other evidence proffered by the defense, was, if error at all, harmless.

Madonna in his Brief at 26-27 recites that the arguments he now makes were presented to the trial judge. While technically accurate, this claim ignores the confused, misleading and often erroneous manner in which the issue was raised.*

Indeed, Madonna's offer was supported by a *pot pourri* of shifting arguments: first, that such secondhand testimony was not subject to the rule against hearsay because Madonna and Larca were co-conspirators,** and second, that since the Government had successfully offered proof

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* Madonna never presented any memorandum on a subject that he now claims is crucial on his appeal. Even though the submission of such a memorandum is not, of course, a prerequisite, its omission shows at the very least that Madonna did not consider the matter important. Indeed, he submitted a legal memorandum prepared by his eminent appellate counsel on the issue of precluding the use of his conviction under Rule 609 even though, as we demonstrate in Point I, *supra*, he never intended to raise that issue. Since the present legal question was clearly foreseeable at least from the time that Madonna's defense was outlined in his opening, the failure to prepare the point shows its insignificance, and certainly demonstrates the burdens under which the trial judge was proceeding.

** Mr. Brown: How can he have a point? The statements of the people who are in the conspiracy are admissible.

The Court: That is generally in furtherance of the conspiracy.

Mr. Brown: No, it is anything that is admissible with respect to the conspiracy. This may be in furtherance." (Tr. 12[illegible]). This, of course, violates the express provision of Rule 801(d)(2) that a co-conspirator's statement be "offered *against* a party."

of out-of-court statements by Madonna on the theory that such declarations constituted admissions and false exculpatory statements, all of Madonna's *other* out-of-court statements should be provisionally received, with the final determination of admissibility apparently resting with the jury. (Tr. 1259).* It is little wonder that Judge Carter found Madonna's justification for the offer of the out-of-court statement "strange." (Tr. 1263).

Subsequently, Madonna's counsel presented three additional grounds for admission of the out-of-court statement. The statement, he now argued, was admissible under each of the first three exceptions to the hearsay rule codified in Federal Rule of Evidence 803—as a "present sense impression," Rule 803(1); as an "excited utterance," Rule 803(2); and as a statement of a "then existing mental, emotional, or physical condition," Rule 803(3). He has now abandoned all but this last.** Thus, while Madonna's present point was technically preserved on the record, it was done so in only the most belated and confusing of manners. The purpose of requiring a specific offer of proof for a ruling on evidentiary matters is to insure that the issue is "called to the attention of the judge, so as to alert him to the proper course of ac-

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* Mr. Brown: "In the concept of what an admission is, an admission is for the jury to determine. Here what this man will say is 'Why did you give him the car?' Or something like that. That is part and parcel of what has been said here and may be construed as an admission against interest in the context of this." (Tr. 1261).

** Madonna's entire presentation of the argument under Rule 803(3) he now presents to this Court was as follows: "How about state of mind? The rule says you can show that, I will attempt to elicit from the witness what he observed, Judge, which I think he has a right to describe." (Tr. 1271).

tion." Advisory Committee's Note, Fed. R. Evid. 103(a). That was insufficiently done in this case.*

Second, the District Court clearly acted well within its discretion in excluding the out-of-court declaration, particularly in view of the confused rationale offered by Madonna for its admission.** While Madonna in his appellate brief divides his argument into two claims—that the statement was "not hearsay" and that it fell

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* This Court has noted the importance of carefully delineating the grounds upon which a statement is offered by holding that a hearsay statement improperly admitted under one exception may not subsequently be justified on appeal even if it was in fact admissible under another exception. *United States* v. *Kaplan*, 510 F.2d 606, 612 (2d Cir. 1974). Similarly, rejection of an offer of proof supported at length by plainly untenable arguments ought not to be reversed on the ground that the offer was proper under a theory mentioned apparently as an afterthought and never clearly explicated to the District Court.

** The law is clear that judgments concerning the admissibility of evidence is primarily assigned to the discretion and judgment of the trial judge, who has the closest grasp of the context of the evidence and the effect of its admission or exclusion. *Hamling* v. *United States*, 418 U.S. 87, 124-27 (1974). Indeed, in a recent case involving a claim on appeal that the defendant was precluded from offering evidence of far more weight and probative value than this, the Court noted,

> "[R]ejection of testimony by the trial court does not necessarily mean that the defendant has been deprived of due process. The accused as well as the Government must comply with the established rules of procedure and evidence in order to assure both a fair trial under the circumstances. In examining [the defendant's] objections we must also keep in mind that questions relating to the admissibility of evidence [are] questions to be determined subject to the rules of evidence and in doubtful cases subject to the discretion of the trial court, the exercise of which may be overturned on appeal solely upon a showing of clear abuse of that discretion."

United States v. *Corr*, 543 F.2d 1042, 1051 (2d Cir. 1976).

within the state of mind exception to the hearsay rule, Rule 803(3)—his argument basically boils down to an assertion that the statement showed that Madonna's demonstrable connection with the red Ford and the transfer of heroin was innocent. The major problem with this, other than that it was never articulated to the trial judge, is that the statement does not show what Madonna claims. For example, Madonna now claims that the statement shows that "Madonna was going to the rendezvous, not to receive delivery of heroin, but only to retrieve his car." Brief at 29. This conclusion simply does not follow from the rhetorical question posed by Madonna. Indeed, the phrasing of Rule 803(3) reflects as much. While the rule states, and the Advisory Committee's Notes adopt, the holding of the well-known case of *Mutual Life Ins. Co.* v. *Hillmon*, 145 U.S. 285 (1892), that a statement of intent is admissible to show the act intended, see also *United States* v. *Stanchich*, Dkt. No. 76-1407, slip op. 1277, 1283 (2d Cir., January 6, 1977), the Madonna question was clearly not a "statement of the declarant's then existing state of mind . . ." since, unlike the declarant in *Hillmon* and its progeny, the declarant never declared his state of mind.* Rather, the question Madonna is claimed to have asked Larca was not a declaration at all but a question, and the inference Madonna now draws from it was an inference upon an inference of a sort clearly not envisioned by the Rules of Evidence. Furthermore, the

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* By contrast, the declarant in *Hillmon* stated "I expect to leave Wichita on or about March the 5th." 145 U.S. at 288. Similarly, the declarant in *Stanchich* stated "I will talk to my people." Slip op. at 1283, n. 1. Finally, in *United States* v. *Annunziato*, 293 F.2d 373, 376 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961), upon which Madonna relies, the out-of-court statement was that a person was "asked . . . *what he intended to do*, and [said] he had agreed to send some [money] up to Connecticut for him." (Emphasis added).

only other inference that Madonna now claims could have been drawn from the statement—that "Madonna had not rented the car for the purpose of lending it to Boriello", Brief at 29—clearly relates not to a future act intended, but to a past act. As such it was precluded by the provision to Rule 803(3) excepting from the exception "a statement of memory or belief to prove the fact remembered or believed." * McCormick, Evidence § 249, at p. 592.

In short, the proper probative value of the statement was non-existent, or at best minimal. On the other hand, the question contained within it implications that were clearly hearsay, since they related to Madonna's version of the facts as to his purpose in renting the car and the anterior factual circumstances of its being lent by Larca to Boriello, about which neither he nor Larca were available for cross-examination. Given this imbalance, the trial judge was clearly justified in excluding the evidence. *United States* v. *Puco*, 476 F.2d 1099, 1105-06 (2d Cir. 1973) (statement offered by defendant properly excluded since it contained hearsay and only "very marginal probative value . . .").

Finally, even if Judge Carter's determination in this regard were error of the sort Madonna now claims, it was clearly harmless. First, it should be noted that the proffered statement was extraordinarily ambiguous, and added

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* This was pointed out in *Shepard* v. *United States*, 290 U.S. 96, 105-06 (1933), in the following terms:

> "Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored."

very little to its factual underpinnings.* Indeed, Madonna never offered the District Court any concise explication of what the statement really meant, and certainly not the complicated and hindsightful exegesis provided by Madonna in his Brief at 29. As against this, it must be recalled that the defense made an unusually lengthy factual presentation, of which the proffered statement was only a tiny part. They called no fewer than twenty witnesses who, if believed, not only showed that the Government witnesses had fabricated their testimony of the involvement of Madonna and Larca, but also offered a totally innocent explanation for Madonna's activities on the day of his arrest. See pp. 20-25, *supra*. In particular, if believed these witnesses demonstrated that Madonna rented the red Ford in order to meet his girlfriend (Tr. 1497, 1499, 1507, 1531-33, 1553-57, 1585) and that (according to Boriello's mother) Boriello was not in fact delivering the heroin to Larca and Madonna at the time of his arrest. (Tr. 1463-64; see also 1388). If believed, these witnesses also established that Boriello borrowed the car from Larca (and thus without Madonna's knowledge) to pick up a girl. (Tr. 1255, 1369). Indeed, the jury was already told that Madonna was

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* Thus, this is not a case like *United States* v. *Dwyer*, 539 F.2d 924 (2d Cir. 1976), where this Court reversed a conviction because of the exclusion of evidence offered by the defendant. In that case, the district judge excluded a defense psychiatrist from testifying, without giving any reasons for his action. This Court found that the proffered evidence would have been of great value in supporting the defense case and, indeed, that the defendant (who admitted committing the crime) had geared his entire defense to the use of that one witness. Given the ambiguous nature of the statement involved here and the wealth of other evidence showing the same events for which it was offered, this case should be governed by the general rule recognized in *Dwyer* that such evidentiary rulings are left to the "wide discretion" of the trial judge. 539 F.2d at 927.

angry about the loan of the car. (Tr. 1256-57, 1285-86). In short, this evidence—which went on at a length and in detail that cannot be concisely summarized here—provided *direct* testimony that allowed the defense to make all the arguments that they now claim could only be made on the basis of the statement,* and was clearly rejected by the jury. To claim that even though the jury apparently disbelieved the entire story presented by the defense witnesses, but nonetheless would have been swayed by one additional statement *from the same witnesses* ascribed to a declarant who did not testify, is risible.** This is particularly clear when the inevitable consequences of allowing the Madonna statement into evidence are examined. Under the express provisions of Fed. R. Evid. 806, had the defense been allowed to introduce the Madonna statement into evidence the Government would have been entitled to attack the credibility of Madonna as a non-testifying declarant—a process that hardly would have aided his cause in the eyes of the jury. Thus, the net gain the defense could have expected was at best minimal.

In short, the judge's ruling was not an abuse of discretion, at any rate, the effect of the exclusion was certainly harmless.

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* A review of the defense summations demonstrates that they fully made the arguments to the jury that they now claim was based upon the rejected statement. (See, e.g., Tr. 1886 *et seq.*, 1915 *et seq.*).

** In particular, the statement did not provide independent corroboration or support for the credibility of the witnesses, but was merely part of and cumulative with their testimony.

POINT III

The Exclusion of the Einstein Hospital Records Was Proper.

Larca contends that the exclusion of hospital records dealing with treatment given to Boriello was error. This argument is based solely upon an extraordinary distortion of the record * and is frivolous.

Boriello testified that he made an initial trip to Thailand in April 1976, returning in late April or early May. (Tr. 104, 105, 109, 112, 116, 242). During the defense case, counsel for Larca produced expurgated xerographic copies (which were thus inadmissible under F. Rule Evid. 1002; see also Rule 106) which, at first blush, appeared to indicate that Boriello received treatment at a methadone clinic on various dates between April 15 and April 26. (Tr. 1738). Contrary to the statement in Larca's brief at 31, the Government never stipulated to the accuracy or admissibility of the documents. Nonetheless, the Court allowed the documents into evidence on the apparent understanding that officials of the hospital would be available to demonstrate their authenticity and trustworthiness. (Tr. 1740).

Later in the trial, during summations, the District Court informed counsel "that these people that we have been looking about with regard to Exhibit V are coming down and will be up at my champers [sic] and will want to talk to me first. I don't know how to handle that. I will try to keep them until you come back from lunch." (Tr. 1842). Despite the Court's virtual invitation for advice, neither defense counsel objected to the procedure.

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* Larca's appellate counsel did not represent him at trial, and thus did not have personal familiarity with the actual facts; we do not contend that the distortion was deliberate.

During the lunch break the Einstein Hospital officials conferred with Judge Carter.* Mr. Marion then explained, on the record and in some detail, that the records offered by Larca simply could not imply that Boriello was in fact in New York on the dates mentioned, since they related only to billing, not to actual presence. Mr. Marion was asked numerous questions by defense counsel. (Tr. 1844-52). Judge Carter then ruled that the records were in fact unreliable for the purposes for which they had been offered, and excluded them. (Tr. 1852-53). Rule 8.

Judge Carter's action cannot seriously be questioned. As Larca himself admits, Brief at 32, the question of trustworthiness is a crucial threshold issue to be determined by a judge, *United States* v. *Robinson*, 544 F.2d 110, 115 (2d Cir. 1976), and the keepers of the records explicitly advised that they were not reliable for the purposes for which they were offered. Furthermore, the admissibility of such documents is consigned to the discretion of the trial judge, and his determination in this regard will not be disturbed in the absence of a clear showing of abuse of discretion. See, e.g., *United States* v. *Ottley*, 509 F.2d 667, 674 (2d Cir. 1975); *United States* v. *Gottlieb*, 493 F.2d 987, 992 (2d Cir. 1974); see also *United States* v. *Fendley*, 522 F.2d 181, 184 (5th Cir. 1975); *United States* v. *Miller*, 500 F.2d 751, 754 (5th Cir. 1974), *reversed on other grounds*, 425 U.S. 435 (1976); *United States* v. *Middlebrooks*, 431 F.2d 299, 302 (5th Cir. 1970). A careful reading of the offer of proof

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* Larca states in his brief at 29 (with italics for emphasis), that Judge Carter conducted this interview with DEA Agent Meale present. This is simply false. While Judge Carter subsequently related "what Mr. Meale has told me" (Tr. 1844) that was obviously a typographical error by the reporter for "Mr. Marion," since the Judge immediately stated in the same sentence, "and I want *him* to put it on the record" (emphasis added). Indeed, nowhere is Agent Meale's name ever mentioned again in this regard, and his presence during a legal discussion would have been most unusual.

made by the defendants and the facts before them and the District Court (Tr. 1844-52) leads to one conclusion: that discretion was not abused. While the events of allowing the records into evidence and then withdrawing them were unfortunate, they clearly resulted only from the District Court's bending over backwards to be fair to the defendants, who were unable to make a proper authentication when they offered the documents, and thus did not prejudice them.

Finally, the contents of the letter from the Einstein Hospital officials brought to the attention of the Court at the time of sentencing (Tr. 2125-29) confirms rather than refutes this conclusion. As the letter itself indicates, the documents Larca offered did not "speak directly to the issue of attendance" during the time in question. (Tr. 2130). Furthermore, while the letter states that a review of "secondary sources" led the writer to the conclusion that Boriello was "probably present" during April (Tr. 2130), this still would not make the documents Larca offered at trial any more trustworthy; indeed, it is apparent even from the limited offer of proof made by Larca at sentence that the documents he offered *even then* were still not admissible. In short, while Larca was clearly not entitled to a second bite at the apple,* he never made a sufficient showing that would allow, let alone require, this Court to reverse the District Court's proper exercise of discretion.

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* Larca never contended at trial (or on appeal) that he needed more time to procure proper documentation for the records. Since the outline of Boriello's testimony, and particularly the dates, must have been apparent from the pre-trial discovery, he would at any rate have had no cause for such a request.

POINT IV

Testimony About the Portman-Klinger Conversation and a Tape Recording of that Conversation Were Properly Received Against the Defendant Klinger.*

Both Larca and Madonna contend that the District Court committed reversible error in admitting solely against the defendant Richard Klinger a conversation between Jan Portman and Klinger that occurred on the evening of August 20, 1976. The contention is meritless.

The Klinger tape was clearly admissible under Fed. R. Evid. 801(d)(2)(E) against *all* the defendants since it was a statement by Klinger in furtherance of a conspiracy in which Larca and Madonna were shown to have joined. Nonetheless, the District Court completely limited any prejudicial effect the tape might have on the defendants other than Klinger by allowing it into evidence only against Klinger. (Tr. 478-80). This decision, and the careful limiting instruction given to the jury about the use of the evidence, totally refutes Larca and Madonna's claim of prejudice.

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* Madonna claims that the description of an individual who ultimately turned out to be defense witness Starace as an "Italian" was prejudicial. Brief at 44. This claim is frivolous. Initially, it certainly did not feed upon any "unfortunate mythology about Italians being criminals," Madonna Brief at 20, for the simple reason that Starace, about whom the description was offered, was not claimed by anyone as being a criminal. Furthermore, the possible prejudicial effect of the description was solely caused by defense counsel, who on cross-examination deliberately blew the entire matter out of all proportion. Finally, the common sense use of a description of a person (then unknown by name) as an Italian was vividly demonstrated by the defense. Investigator Agli, when asked to describe the unnamed and chimerical woman Madonna claimed to be romancing, and lacking a better description, described her as "of Italian extraction." (Tr. 1542).

First, it should be noted that the cryptic references in the recording were simply not devastating against Larca and Madonna. It was apparent to the jury that the Government's offer of the Portman-Klinger conversation was made only for the purpose of proving Klinger's knowing participation in an unlawful enterprise, and not to affix a pejorative label on Klinger's co-defendants. Nothing in the Government's proof suggested that Klinger had ever met Larca and Madonna or was in any position to know who supervised Boriello's actions in the conspiracy. Indeed, the conversation itself made Klinger's lack of knowledge abundantly clear, since the portion of the conversation at issue on this appeal was immediately preceded by Klinger's admission that he did not know the others involved.* Moreover, Klinger never directly answered Portman's inquiry about Mafia involvement in the case; again underscoring his peripheral role in the conspiracy, he replied that "they're the type of people . . . I wouldn't want to know too personally."**

The efficacy of the District Court's careful limiting instruction can be measured by this Court's recent deci-

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* Portman: "Are they . . . huh?

Klinger: I, *I don't know.* Call him the Godfather." (Emphasis added). (GX 52, 52A).

** While Larca contends in his brief that the references were "contextually inculpatory" in the light of the overwhelming evidence other than the tape connecting Klinger to Larca in the narcotics enterprise, Brief at 20 n.*, that argument is refuted by this Court's analysis of the requirements of *Bruton* v. *United States*, 391 U.S. 123 (1968). This Court has held that even where other evidence at trial demonstrates that an incriminating reference in a post-arrest confession must have referred to a co-defendant, that fact will not preclude use of the confession in a joint trial since the confession does not *itself* incriminate the co-defendant. *United States* v. *Wingate*, 520 F.2d 309, 314 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976); *United States* v. *Trudo*, 449 F.2d 649, 652-53 (2d Cir. 1971), *cert. denied*, 405 U.S. 926 (1972). These cases govern *a fortiori* when the evidence was not incriminating, and when the declarant was, like Klinger, available for cross-examination.

sion in *United States* v. *Rosenwasser*, Dkt. No. 76-1260, slip op. 1973 (2d Cir., Feb. 24, 1977). In that case, the Court considered the effectiveness of a limiting instruction when evidence admitted against one defendant clearly had potential for prejudice to a co-defendant on trial. Rosenwasser was tried with one Allicino on charges of receiving goods stolen from interstate commerce and conspiracy so to do. As part of its case against Allicino, the Government offered proof of a similar act—Allicino's receipt of a stolen interstate shipment of liquor. As the Court noted, this "evidence against Allicino was not . . . clearly unrelated to the charges against Rosenwasser" in that Allicino's receipt of the stolen liquor occurred "only three weeks after the alleged purchase by Rosenwasser of the hijacked women's garments; moreover, the liquor was recovered in the same building and on the same floor in which Rosenwasser rented space," a point which the prosecutor emphasized in summation. Slip op. 1977-78. Nevertheless the Court held that the court's limiting instructions provided Rosenwasser with effective protection against misuse of the testimony. *Rosenwasser* further held that since the evidence was offered solely against Allicino it was not error to deny Rosenwasser the opportunity to cross-examine the witness through whose testimony the similar act was proved.

Further, unlike the defendant affected by the "similar act" in *Rosenwasser*, and unlike defendants affected by out-of-court confessions by co-defendants in such cases as *Bruton* v. *United States*, *supra*, and its progeny, Larca and Madonna had the benefit of Klinger's testimony on the stand—in which he presented an innocent explanation for his use of the "Godfather" expression—and the opportunity, which neither Larca nor Madonna utilized,

to cross-examine Klinger about the out-of-court statements which were received against him.*

Finally, it should be noted that virtually all of the decisions upon which Larca relies involved trials where the Government or a Government witness made prejudicial characterizations of the defendant, violating the obvious principle that the prosecutor cannot bolster his case by name-calling. Here, the incidental reference was by a co-defendant. Not only did that co-defendant offer an explanation for his statement (which was never challenged by the Government), but the prosecutor never even referred to the "Godfather" reference during summation or indeed at any time during the trial. In short, the admission of the tape was not an abuse of discretion ** and clearly was not the pervasive error Larca claims.***

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* Klinger stated that the "Godfather" reference was a personal joke. (Tr. 1684).

** Larca cites this Court's decision in *United States* v. *Robinson*, 544 F.2d 611 (2d Cir. 1976), and indeed relies upon it heavily for the propositions that the trial court's exercise of discretion should be reviewed and that the instruction to the jury was insufficient. The *Robinson* case is, of course, distinguishable on its facts. In addition, this Court has granted the Government's petition to review the split decision *en banc*.

*** Larca claims that the error could not be harmless since the case against him was so thin. Contrary to Larca's contention, Brief at 25, the case against him did not rely solely on Boriello. Visceglie's testimony clearly demonstrated Larca's intent and his relationship with Madonna, and Visceglies' credibility was enhanced by the demonstrated fact that he had sworn to his knowledge of the facts months *before* Boriello, Larca and Madonna were arrested. In addition, the testimony of the events surrounding these gentlemen's arrests on August 20, while circumstantial, was powerful evidence of their guilt. Finally, Larca's statement to the arresting agent that "no one could have followed us" (Tr. 962-63) was clearly inculpatory.

POINT V

The Trial Court Properly Exercised Its Discretion in Admitting Evidence of a Prior Similar Act Involving Madonna and Larca.

Nicholas Visceglie testified that in 1972 he entered into negotiations with Madonna in which Madonna, using Larca as an intermediary, was to sell him several kilograms of heroin.* This evidence was clearly admissible.

The law is well-settled in this Circuit that evidence of other crimes is admissible, if relevant, except when offered solely to prove criminal character or disposition.** *United States* v. *Chestnut*, 533 F.2d 40, 49 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3250 (Oct. 5, 1976); *United States* v. *Santiago*, 528 F.2d 1130, 1134 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976); *United States* v. *Leonard*, 524 F.2d 1076, 1091 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976); *United States* v. *Papadakis*, 510 F.2d 287, 294-5 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *Williams*, 470 F.2d 915, 917 (2d Cir. 1972); *United States* v. *Johnson*, 382 F.2d 280, 281 (2d Cir. 1967); *United States* v. *Deaton*, 381 F.2d

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*While both Larca, Brief at 42, and Madonna, Brief at 42-43, make a number of disparaging remarks about Visceglie's credibility, that issue was clearly for the jury. Indeed, this Court has held that the uncorroborated testimony of an accomplice is sufficient to support a conviction, *see e.g.*, *United States* v. *Bernstein*, 533 F.2d 775, 790-91 (2d Cir. 1976); it must follow *a fortiori* that such a witness may testify about a similar act. At any rate, Visceglie's credibility was enhanced by the fact, properly brought before the jury, that he had testified about the 1972 acts before a grand jury months *before* Boriello, Madonna, or Larca was arrested. (Tr. 1196-97).

**Neither appellant claims, nor could they, that the prosecutor ever abused the similar act evidence by painting either defendant with a "bad man" brush.

114, 117 (2d Cir. 1967). Among the purposes for which prior and subsequent similar acts are admissible are proof of knowledge, intent, and plan or design. *United States* v. *Miller*, 478 F.2d 1315, 1318 (2d Cir.), *cert. denied*, 414 U.S. 851 (1973); *United States* v. *Friedman*, 445 F.2d 1220, 1224 (2d Cir. 1971); *United States* v. *Johnson*, *supra*.

Rule 404(b) of the Federal Rules of Evidence has codified the pre-existing law in this Circuit, and reads as follows:

> "Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Evidence of the February 1972 narcotics transaction was admissible for any of several distinct purposes. First, it demonstrated that Madonna's relationship with Larca was not an innocent one, as the defense indicated in their opening they would demonstrate. (Tr. 70-71, 78-79). This Court has recognized the probative value of similar acts for this purpose on numerous occasions. See, e.g., *United States* v. *Magnano*, 543 F.2d 431, 435 (2d Cir. 1976);* *United States* v. *Natale*, 526 F.2d

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* *Magnano* also disposes of the contention raised by Larca, Brief at 45 n.*, that the prior acts should have been precluded because of age. While this Court's opinion notes that the prior acts involved in *Magnano* preceded the acts underlying the indictment by "several years," *id.* at 435, the record and briefs in the case indicate that the gap was more than ten years, a fact vociferously emphasized by the appellants in that case. See also

[Footnote continued on following page]

1160, 1173 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976), and cases cited therein. Since the theory of the Government's case was that Madonna was the senior but silent partner in Larca's narcotics activities, the Visceglie evidence was clearly probative.

In addition, the evidence was clearly probative of Madonna and Larca's intent, knowledge, and motive—all issues raised with great clarity by the defense *—as well as the absence of mistake. This, of course, was in direct contrast to the contentions of the defense, announced in the opening, that the meeting with Boriello was essentially a "mistake." Indeed, this Court's decision in *United States* v. *Miller*, *supra*, is instructive and controls this case. In *Miller*, the defendant was found parked in a car in front of a bank where a bank robbery was admittedly taking place. This Court held that the evidence was clearly probative of showing that the defendant participated in the bank robbery by acting as a lookout for those who robbed the bank, as the Government contended, noting that "[t]he uncharged bank robbery, however, could have been proven on the Government's direct case to show . . . that the appellant was not merely an innocent participant in the robbery for which he was tried." 478 F.2d at 1318. That logic is conclusive here.

United States v. *Lewis*, 423 F.2d 457 (8th Cir. 1970), *cert. denied*, 400 U.S. 905 (1971); *United States* v. *Yaughn*, 493 F.2d 441 (5th Cir. 1974). Nor did the *Magnano* similar act evidence involve, as Larca contends, Brief at 45, "the background and development of the conspiracy," if only because the break in time made it clear that the similar act evidence involved a wholly separate conspiracy. Rather, the evidence simply showed the relationship among the conspirators.

* At any rate, the law is clear that the Government may use such similar act evidence in order to meet its burden of establishing the essential elements of the offense and need not wait until the elements are put in issue by the defendants. *United States* v. *Johnson*, *supra*.

Finally, it should be noted that the scope of this Court's review of Judge Carter's decision is exceedingly narrow. This Court has observed that district judges have a "wide range of discretion" in admitting similar act evidence. *United States* v. *Santiago*, *supra*, 528 F.2d at 1135. In *United States* v. *Leonard*, *supra*, Judge Friendly recently made the following observation concerning similar act evidence:

> "In any case, the weighing of the probative value of the evidence against its potentially prejudicial effect is primarily for the trial judge who has a feel for the effect of the introduction of this type of evidence that an appellate court, working from a written record, simply cannot obtain. We said in *United States* v. *Ravich*, 421 F.2d 1196, 1203-04 (2d Cir.), *cert. denied*, 400 U.S. 834, 91 S. Ct. 69, 27 L. Ed. 2d 66 (1970) citing *Cotton* v. *United States*, 361 F.2d 673, 676 (8th Cir. 1966); and *Wangrow* v. *United States*, 399 F.2d 106, 115 (8th Cir.), *cert. denied*, 393 U.S. 933, 89 S.C. 292, 21 L. Ed. 2d 270 (1968), that 'his determination will rarely be reversed on appeal.' " 524 F.2d at 1092.

See also *United States* v. *Rosenwasser*, Dkt. No. 76-1260, slip op. 1973, 1979 (2d Cir., Feb. 24, 1977).* Judge Carter can scarcely be said to have acted capriciously. He reviewed submitted memoranda of law before admitting the evidence, and gave the jury a careful limiting instruction at the time the evidence was introduced and in his charge (Tr. 2028-29) to which no objection

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* Indeed, *Rosenwasser* involved a much more difficult issue of the use of similar acts against one defendant in a multiple defendant case. While Klinger might have raised that issue, he has not appealed.

was made.* His determination was in all respects proper.

POINT VI

The District Court's Rulings on The Admission and Exclusion Of Proof Were Correct, and The Scope Of Cross-Examination Was Not Improperly Restricted.

(a) Introduction

Larca contends that a number of errors occurred in the Court below that cumulatively require reversal of the judgment of conviction. This contention is proved patently false by the record itself.**

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* In fact, Judge Carter's instruction to the jury on this point was remarkably generous to the defense. He told the jurors that they could not consider the similar act evidence against Madonna and Larca unless they *first* found beyond a reasonable doubt that each of them entered into the conspiracy charged in the indictment. Since the Government clearly can use similar act evidence to meet its burden of proof, see *United States* v. *Johnson, supra,* the defendants received far more than what they deserved, and the instruction virtually ruled out any possibility of prejudice.

** Larca makes a general claim that the record is "replete with examples of the Court's failure to allow the defense to make specific objections" in contrast to the allegedly complete latitude afforded to the Government in this regard. (Larca Brief, pp. 33-34, n.). This contention is purportedly buttressed with references to the record. The Government submits that these very references demonstrate the utter fallacy of the claims. For example, Larca refers to an offer of proof which he requested as to certain exhibits proffered by the Government. (Tr. 417-18; GX 19A, 19B and 19C). The record demonstrates that the Court conducted a side bar conference on this question and correctly determined that the exhibits were admissible. (Tr. 418-

[Footnote continued on following page]

(b) The Court allowed full cross-examination of Joseph Boriello.

During the direct examination of Boriello, Larca raised the issue of the pertinency of prior convictions to his cross-examination of this witness.* (Tr. 202-09). Larca suggests in his brief that the lower court refused to allow cross-examination of Boriello with respect to misdemeanor convictions for possession of a gun, two separate charges of possession of narcotics and for conspiracy to forge prescriptions. (Larca Brief at 34). All but the last of these convictions were clearly precluded by the provision of Fed. R. Evid. Rule 609(a)(1) that prior convictions may be the subject of cross-examination only if they were "punishable by death or imprisonment in excess of one year . . ." In addition, subsection (b) of Rule 609 prohibits such cross-examination if a period of ten years has elapsed since the later of either the date of the conviction or the release of the prisoner from confinement for that offense.**

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200). During Larca's cross-examination of Joseph Boriello, and without having made an objection, Madonna's counsel requested a side-bar conference. (Tr. 262). The Court refused to grant such a conference but at the request of Madonna stated that the point might be made at a later time. (Tr. 263). In short, the very citations to the record offered by Larca demonstrate the ample opportunity afforded him by the trial court to present objections and to argue them. Moreover, the record demonstrates that the rulings of the lower court with respect to these objections were correct and fair.

* This conference was held out of the presence of the jury and the argument was fullsome.

** Larca's counsel conceded that Boriello's misdemeanor convictions for narcotics and possession of a gun were "within the purview of the ten-year rule" (Tr. 203) and that *United States* v. *Provoo*, 215 F.2d 531 (2d Cir. 1954) governed the issue, stating "I accepted what your Honor said about the rule . . ." (Tr. 205). Then, having conceded that the gun and narcotics

[Footnote continued on following page]

Thus, it is clear that the exclusion of these convictions was clearly proper under the governing Rule. In addition, even under the discretionary standards in effect prior to the effective date of the Rule, Judge Carter's decision was proper, since under all the tests such as age, relevance to veracity, and the nature of the conviction, the convictions were not necessarily admissible. See *United States* v. *Palumbo*, 401 F.2d 270, 273 (2d Cir. 1960), *cert. denied*, 394 U.S. 947 (1969); *United States* v. *Puco*, 453 F.2d 539 (2d Cir. 1971). Finally, the trial judge's decision in this regard must be viewed in the context of extraordinarily lengthy cross-examination of Boriello, in which he admitted not only felony convictions far more significant than the minor infractions now complained of (Tr. 104-05), his own addiction (Tr. 112, 156, 196, 230-33, 248-53, 256-72, 360, 374, 380, 385-85, 394, 395-96), his self-interest in agreeing to testify for the Government, as well as his own role in the events underlying the trial and other tawdry details of his life. In

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charges were unavailable to him for impeachment purposes, Larca directed the Court's attention to the misdemeanor conviction for conspiracy to forge prescriptions as being a permissible avenue of cross-examination under Fed. R. Evid. 609(a)(2) (Tr. 205-09). The Court stated that a conviction for conspiracy to forge did not appear to fall within the parameters of this section of the Rule governing crimes involving dishonesty or false statement. (Tr. 206-08). However, the Court subsequently indicated that decision on this question would be reserved (Tr. 236-37), but Larca never raised this issue again despite his present claim of its "critical importance" to Boriello's credibility. (Larca Brief, p. 35). Thus, under this Court's explicit decision in *United States* v. *Nathan*, 536 F.2d 988, 992 (2d Cir. 1976), he is precluded from raising it on appeal. At any rate, the forgery conviction was more than ten years old, and was thus precluded by Rule 609(b), which governs even prior conviction for false statement. Counsel cannot claim that Judge Carter should have exercised the discretion afforded him by Rule 609(b), since they made no written request as provided by that Rule.

addition, of course, the defense proffered the testimony of several witnesses which, if believed, would have demonstrated that Boriello not only was unstable (Tr. 1343-44, 1388-90, 1463-64, 1468-69, 1471-72)* but had stated he would frame the defendants. (Tr. 1343, 1388, 1389, 1464). In short, the exclusion of clearly inadmissible further data simply could have had no effect on the jury's assessment of Boriello, and was justified by the district judge's acknowledged power to limit the introduction of cumulative matter in an already lengthy cross-examination. *United States* v. *Green*, 523 F.2d 229, 237 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976); *United States* v. *Pacelli*, 521 F.2d 135, 137 (2d Cir. 1975), *cert. denied*, 424 U.S. 911 (1976); see also *United States* v. *Kahn*, 472 F.2d 272, 281 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); *United States* v. *Mahler*, 363 F.2d 673, 676-78 (2d Cir. 1966).

(c) The admission of the limited portion of Boriello's grand jury testimony was proper.

During the lengthy case presented by the defense, several witnesses testified about conversations they had with Boriello in September 1976. If this testimony were believed, it would have shown that Boriello threatened to involve his brother (among others) in the narcotics activities underlying this trial. That statement, of course, was not itself relevant or probative of any of the ultimate factual issues at trial; it was, however, properly admissible for the limited purpose of impeaching Boriello and in particular of showing a bias and a motive to fabricate. See *United States* v. *Harvey*, Dkt. No. 76-1183, slip op. 6029, 6032 (2d Cir., November 24, 1976). During the

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* Boriello's own mother stated that he was a "sick boy." (Tr. .....).

Government's rebuttal, the prosecutor offered, and was allowed to introduce, strictly limited portions of Boriello's grand jury testimony, which antedated by several days the meeting described by the defense witnesses. In those portions of the grand jury testimony, Boriello described his agreement with the Government, which had already been the subject of extensive cross-examination by Larca when Boriello testified. (Tr. 244-48, 290, 292, 295-96, 300). In particular, he stated under oath that as part of his agreement with the Government his brother would not be prosecuted. This grand jury testimony was clearly admissible under either of two theories.

First, the testimony was clearly a prior consistent statement that served to rebut an express implication that his trial testimony was false and fabricated. See Rule 801(d)(1)(B); see also *United States* v. *Lombardi*, Dkt. No. 76-1471, slip op. 2103, 2104-05 (2d Cir., March 1, 1977). The statement showed that Boriello's brother's involvement was no longer a concern to him at the time of his grand jury appearance (since that issue had already been resolved), and thus belied the claimed inconsistent statement offered by the defense that he was still concerned with that matter several days later.

Second, the agreement itself had been made an issue by the defense (and, indeed, they had extensively cross-examined Boriello about it), and thus its terms were relevant and admissible.* As both this Court, *United States* v. *Scandifia*, 390 F.2d 244, 251 n. 8 (2d Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969), and the Supreme Court, *Anderson* v. *United States*, 417 U.S. 211, 219 (1974), have noted, a statement is not hearsay if it is used only to show the effect upon a party to it. In short, that portion of the grand jury minutes

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* Indeed, the defendants never contested the *relevance* of the evidence, but only the hearsay nature of it.

was itself admissible as extrinsic proof to show the terms of the agreement at the time of the testimony. Since Larca did not (and still does not) seriously challenge the accuracy of the minutes themse[illegible] * it follows that the evidence was properly admitted.

Finally, it should be noted that the cases upon which Larca relies in his brief are wholly inapposite. Without exception, they concern cases in which *incriminating evidence against the defendant* showing his participation in the crime for which he was charged was admitted without the defense having the opportunity to cross-examine the maker of the statement. They are of no relevance in a case such as this, where the terms and timing of an extrinsically demonstrable agreement were raised by the defense.**

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* It should be noted in this regard that at the very same time that the trial court allowed the prosecutor to introduce the minutes (without any objection on the issue of authenticity), he also allowed the defense to introduce redacted, xerographic copies of the Einstein Hospital records without any demonstration of authenticity. (Tr. 1743). The appellants surely cannot now complain of a time-saving procedure from which they equally benefited. In addition, while subsequent indications demonstrated that the Einstein Hospital records were in fact insufficiently reliable, see Point III, *supra*, the defense never even attempted such a demonstration or to further cross-examine Boriello under the last sentence of Fed. R. Evid. 806, as they concede in Larca's brief at 41 n.**.

** Judge Carter was extremely conscious of this. Although the entirety of the grand jury testimony would have been admissible to demonstrate the absence of recent fabrication, see *United States* v. *Lombardi*, *supra*, the cautious trial judge on several occasions insisted that all references to any of the defendants on trial be excised, which was duly done. (Tr. 1741, 1742).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JOHN P. FLANNERY, II,
PATRICIA ANNE WILLIAMS,
ALLEN R. BENTLEY,
FREDERICK T. DAVIS,
Assistant United States Attorneys, Of Counsel.

AFFIDAVIT OF MAILING

State of New York)
: ss.:
County of New York)

John P Flannery being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 21st day of March, 1977 he served a copy of the within brief
2 copies
by placing the same in a properly postpaid franked envelope addressed:

1. Edward Bennett Williams, Esq
1000 Hill Building
Washington, D.C. 20006

2. John Pollock, Esq
177 Madison Avenue
New York, N.Y. 10022

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

John P Flannery

Sworn to before me this
21st day of March, 1977

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977